73-1472

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1472

PETER J. MIGLIORINI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

SPIROS A. TSIMBINOS and
WILLIAM KOHN
Attorneys for Petitioner
Office & Post Office Address
125-10 Queens Boulevard
Kew Gardens, New York 11415
Telephone: (212) 699-6110

April 1, 1974

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Peter J. Migliorini, petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division, Second Department, of the New York State Supreme Court which affirmed a judgment of the Supreme Court, Richmond County convicting the petitioner of the crime

of Bribery under Section 200.00 of the New York State Penal Law. The New York State Court of Appeals has denied petitioner leave to appeal to that court and petitioner has exhausted all of his state remedies.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York affirming petitioner's conviction is officially reported. (People v. Peter J. Migliorini, 43 A.D.2d 731). The opinion of the Honorable Sol Wachtler, Judge of the New York Court of Appeals, denying leave to appeal to the court is as yet officially unreported but a copy is set forth in Appendix A.

JURISDICTION

The judgment of the Appellate Division, Second Department, of the Supreme Court, State of New York re-affirming petitioner's judgment of conviction was entered on January 3, 1974. Petitioner received notice of said entry of judgment on January 11, 1974. Application for leave to appeal to the New York

State Court of Appeals was denied on February 7, 1974. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether under the peculiar circumstances of the instant case a police officer may, under the provisions of Section 401(4) of the New York State Vehicle and Traffic Law, stop a motor vehicle for a "routine check" when there has been no indication of either a traffic infraction or a physical problem with the motor vehicle.

2. Is a search resulting from the initial stopping of petitioner's vehicle as described above in violation of the petitioner's constitutional rights so as to require the suppression of any evidence or statements obtained as a result of said search.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth and Fourteenth Amendments to the

United States Constitution. In addition the validity of Section 401(4) of the New York State Vehicle and Traffic Law is in question. Section 401(4) is reproduced in Appendix B.

STATEMENT

The record in the court below establishes that a vehicle driven by petitioner, Peter J. Migliorini, was stopped by police officers on a New York City street on the basis of a "routine check". It is undisputed that at the time the vehicle was stopped there were no traffic infractions being committed and there was nothing wrong with the condition of the vehicle. The stop was merely a routine check similar to one of 500 conducted by the officers in the preceeding three months. The People conceded in their brief to the Appellate Division that:

> "Admittedly at the time he was stopped the appellant had committed no crime in the presence of the police officers to their knowledge. The stopping of his car was but one of a number of routine halts wherein the police officers

would inquire of motorists concerning their license and registration. This action is authorized by Vehicle and Traffic Law, Section 401, subd. 4."

When stopped the petitioner produced his license and registration and these were in order. One of the police officers, however, based upon a course in auto theft at the police academy felt that the last 6 digits of the registration number did not correspond to the make and type of vehicle in question. The petitioner was then directed to open the hood of the vehicle and upon further inquiry it was discovered that the vehicle was listed as being stolen. During the ride to the police station following petitioner's arrest it was alleged that the petitioner had offered to pay the officers to "forget the matter". Petitioner was thereupon charged with Criminal Possession of Stolen Property and Bribery.

After a hearing held to determine the legality of the search and seizure as well as the admissibility of any statements made by the petitioner, the Richmond County Supreme Court (Barlow,J.) denied petitioner's motion to suppress.

A plea of guilty to the Bribery charge was thereafter entered in full satisfaction of all counts in the indictment. The petitioner, a Vietnam war veteran, was thereafter sentenced to an indeterminate term of three years. An appeal was thereafter taken to the Appellate Division which affirmed the conviction in the court below. The Court of Appeals of the State of New York has refused to grant leave to appeal to that court. The petitioner has been free on bail in the amount of $7500. during the pendency of his prior appeals.

By statutory provisions in New York the issue of the correctness of the Court's ruling denying petitioner's motion to suppress is preserved for appeal despite an ensuing plea of guilty. (N.Y.S. Criminal Procedure Law, Section 710.70). The issues presented to this court for consideration were raised in the Supreme Court, Richmond County, by duly noted exception to the court's ruling (pg. 80, 138 Record on Appeal, see Appendix A) and in the Appellate Division by presentation of the issues in the appellant's brief. See Appendix C.

Petitioner seeks review by this Court in a Writ of Certiorari because of the novel and important issues presented.

The Supreme Court in Pennsylvania in the case of Commonwealth v. Swanger, 300 A.2d 66, reaffirmed in 307 A.2d 875 recently held that a

> "stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Motor Vehicle Code."

The Pennsylvania Motor Vehicle Code as well as that of other states is substantially similar to that of New York's which was used as the basis to support the stop of the petitioner's vehicle in the case at bar. The Pennsylvania court relied in its decision on this court's ruling in Terry v. Ohio, 392 U.S. 1 and Almeida Sanchez v. U.S. - U.S.- 93 S.Ct. 2535, 37 L.E.2d 596 (1973). Since the Pennsylvania Supreme Court ruling in the Swanger case, other courts have taken positions on the issue on both sides of the fence. See U.S. v. Pearce, 356 F.S. 756 (E.D. Penn. 1973); Oregan v. Head, 509 P.2d 52 (Ct. App. Oregon 1973). The holding of the Pennsylvania Supreme Court based upon this court's prior rulings would compel the suppression of evidence in the case at bar since the factical circumstances are indistinguishable. In the case at bar the petitioner

was stopped merely for a routine traffic check and for no other reason.

There is thus a substantial conflict among the courts of this nation as to the specific issue sought to be reviewed. This court has not specifically ruled on the issue but based upon prior determination it appears that the decision of the New York Courts are probably not in accord with applicable decisions of this court. More specifically, this court's recent decision in U.S. v. Robinson -U.S.- 94 S.Ct. 467 and Gustafson v. Florida -U.S.- 94 S.Ct. 488 (1973) would seem to support the view that a person may not be stopped either in a vehicle or on foot unless there is some reasonable basis for doing so. This court in the Robinson and Gustafson cases while extending the permissible scope of the search where a party has lawfully been stopped for traffic violations specifically ground its decision on the fact of a lawful arrest based upon probable cause. The court stated:

> "It is the fact of a lawful arrest which establishes the authority to search."

It is respectfully submitted that

placing the decision of the New York Courts in the case at bar together with this Court's ruling in Robinson and Gustofson, will lead to a situation where a person driving a vehicle can be stopped for no reason whatever on the purported basis of a "routine check" and thereafter subjected to the most thorough of personal searches. Such a situation would be clearly contrary to the spirit and intent of the Fourth Amendment prohibition against unreasonable search and seizures.

The present confusion in this area and the lack of a definite statement by this court on a fundamental issue warrants this court's review of the case at bar.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

SPIROS A. TSIMBINOS and
WILLIAM KOHN
Attorneys for Petitioner
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 699-6110

APPENDIX A - Ruling of Supreme Court, Richmond County (Barlow, J.) October 27, 1972, Motion to Suppress.

THE COURT: I will take it as a separate motion. First, this motion. The motion to suppress is denied. In my opinion the police officer had a probable cause to make further investigations as to the authenticity of the registration of this vehicle by going under the hood. The probable cause in my opinion stems from his knowledge as an expert that the number on the registration and on the dashboard VIN number were not appropriate for this type of car. Also, I include as another element of probable cause the fact that the warranty sticker which contained the VIN number was missing from the door. Now, that takes care of this motion. You have an exception.

MR. REIGI: May I be heard on that, if your Honor please?

THE COURT: Yes, I will hear you.

MR. REIGI: If your Honor please, the VIN number on the dashboard, and the number corresponding on the registration were the same, if your Honor please. There was no probable cause here for any

search. This automobile was stopped for no probable cause whatsoever. There was no traffic violation, none. You heard the officer testify.

On top of that, if your Honor please, the officer could not testify as to his qualifications outside of spending two days in school, not taking any examinations, whether people qualified to train them are there. He had no training by any of the corporations which manufacture Eldorado Cadillacs, and when I questioned him as to the number of arrests he made, there was no showing here that there were any convictions, or he went through any trials on these particular cases. No experience, your Honor, on this matter. The district attorney did not bring that out. He couldn't remember how many cars, how many cases he had in court.

Judge, under the circumstances, I say this man wasn't qualified to testify as an expert in this case, and at this time I also press that particular point. I feel that there was no probable cause here, and it is due violation of the constitutional rights of the defendant under the fourth, fifth and 15th amendment of the United States. There was no probable cause here for a search, none whatsoever.

How far can they go, Judge? Can they tear the engine apart, can they pull the transmission apart for numbers? Can they detain people any time they please? I say no, your Honor. I say constitutional rights of the defendant were violated, and under the circumstances, I respectfully ask the Court that the evidence in this case be suppressed.

THE COURT: I adhere to my original decision. Police have a right to stop any motor vehicle and ask for a registration and driver's license. They have a right then to compare them to the visible VIN number, and if the police officer is properly expert and has the requisite knowledge of the numbers to be anticipated for certain type of vehicles, if the registration number that he finds, the VIN number that he finds does not conform to his expert knowledge, he has a right then, he has probable cause then to investigate further and to check the numbers, the VIN numbers listed under the hood of the car.

MR. REIGI: If your Honor please, I want to bring just one point out; that the registration number and the VIN number in the car were exactly the same.

THE COURT: And wrong, as the police officer knew; an impossible number for a car of that type. You have your exception.

MR. REIGI: Very good.

* * * * * *

Ruling of Supreme Court, Richmond County (Barlow, J.) Huntley Hearing.

THE COURT: Defendant's motion to suppress the incriminating statements is denied.

MR. REIGI: Exception, if your Honor please.

Order Denying Motion To Suppress
(Barlow, J.)

At a Criminal Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse thereof, Borough of Richmond, City of New York, on the 27th day of October, 1972.

PRESENT:
HON. THEODORE G. BARLOW
Justice

(SAME TITLE)

Indictment No. 175/1972
Motion To Suppress Evidence
Heard October 27, 1972
John M. Braisted, D. A.
Richmond County
Opposed

Upon the hearing held herein, and the opinion of the Court herein, it is

ORDERED, that the motion To Suppress Evidence be, and the same hereby is, DENIED.

E N T E R

s/ T. G. B.
J. S. C.

Opinion of The Appellate Division, Second Department, of the Supreme Court of the State of New York, decided December 24, 1973.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. PETER J. MIGLIORINI, Appellant.—Judgment of the Supreme Court, Richmond County, rendered March 27, 1973, affirmed. No opinion. The case is remitted to the Supreme Court, Richmond County, for proceedings to direct defendant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5). Hopkins, Acting P. J., Munder, Martuscello, Gulotta and Brennan, JJ., concur.

Opinion of the Court of Appeals
of the State of New York Denying Leave
To Appeal.
Before: Hon. Sol Wachtler, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

against

PETER J. MIGLIORINI

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
February 7, 1974

s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, Richmond County, dated March 27, 1973, affirmed by order of Appellate Division, Second Department, dated January 3, 1974.

APPENDIX B

New York State Vehicle and Traffic Law, Section 401 (4).

Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer or state policeman produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, officer or policeman any information necessary for the identification of such vehicle and its owner, and all information required concerning his license to operate, if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, officer or policeman as a further means of identification. Provided, however, that for any vehicle registered under the provisions of subdivision seven or eight of section four hundred one of this chapter, a photostatic copy of the certificate of registration or registration renewal stub may be produced in lieu of the original certificate or stub. The production of a

license to a magistrate, inspector, officer or policeman shall be prima facie evidence in a prosecution for a violation of any provision of this chapter, other than section three hundred ninety-two, that the person who so produced the license is the person identified on such license. The failure to produce the certificate of registration, or the registration renewal stub, or, when permitted, a photostatic copy of such certificate or stub, as provided herein, shall be presumptive evidence of operating a motor vehicle or trailer which is not registered as required by this article.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

PETER J. MIGLIORINI,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment of the Supreme Court of the State of New York, Richmond County, rendered on March 27, 1973 convicting the appellant after a plea of guilty of the crime of bribery and sentencing him to an indeterminate term of up to three years (Barlow, J. Plea and Sentence). A stay of judgment was granted on April 10, 1973 and the appellant has been free on bail in the amount of $7,500 pending this appeal (Barshay, J.).

STATEMENT OF FACTS

The Indictment

In Indictment No. 175/72 filed June 6, 1972, the appellant was charged with Criminal Possession of Stolen Property in the first degree (165.50 P.L.), Unauthorized Use of a Vehicle (165.05 P.L.), Illegal Possession of a Vehicle Identification Number (170.70 P.L.), and Bribery. The Indictment alleged that on May 6, 1972, the appellant knowingly possessed a stolen 1971 Cadillac, and upon being arrested by a police officer attempted to bribe the officer in order to secure his release *(R. 4-7).

*R - Refers to Record on Appeal

Motion to Suppress

On October 26, 1972, a hearing was had before Hon. Theodore Barlow to determine the appellant's motion to suppress certain physical evidence which had been obtained by the police upon the search of the appellant's vehicle. The appellant contended that the search of the vehicle, which was accomplished without a warrant, violated his Constitutional rights.

Patrolman FREDERICK WILMOT testified that he was assigned to the 122 Precinct in Staten Island on May 6, 1972 and was driving with his partner, ROBERT FAHEY, on a 6 P.M. to 2 A.M. tour (R.11, 12). His duties on that day were to stop automobiles for safety checks, i.e. to stop vehicles for proper registration and license checks or for physical violations. He had been on this duty for approximately three months, and had stopped about 500 cars (R.12, 13). In the course of this duty, the patrolman, at about 12:15 A.M., in the vicinity of Hylan Blvd. and Rose Ave. observed the appellant driving a 1971 Cadillac (R.15). The patrol car followed the appellant for approximately two miles and motioned to the appellant to pull over (R.16,18). WILMOT testified that the appellant was

not violating any traffic regulations at the time of being stopped nor was there any physical problem with his car. The appellant was merely stopped for a routine check similar to that conducted by the patrolman during the previous three months (R.19,41,47,48,56). The appellant produced his license and registration when asked, and both the license and registration were valid (R.23). Patrolman Wilmot stated, however, that he had noticed the warranty sticker missing from the door of the vehicle, and in addition according to his knowledge, the last 6 digits of the registration number did not correspond to the make and type of vehicle which the appellant was driving (R.20,23). Patrolman Wilmot stated that he had taken a two day course at the Police Academy on auto theft, and had learned how to examine registration and license numbers and how to use the National Theft Book. According to his training, the last six digits of a 1971 Eldorado should have been in the four hundred thousand's rather than 122863, which the appellant's registration displayed. The course alleged to have been taken by Officer Wilmot and which was used as a basis to qualify the officer as an expert witness consisted of less than 12 classroom hours, and no examination

was given to determine the student's proficiency. Wilmot was unable to name a single instructor who imparted this auto theft information to him (R.34-40).

After checking the license and registration, Wilmot further checked the vehicle identification on the dashboard. This number corresponded with the registration which the appellant produced (R.29, 55). Still unsatisfied, Wilmot ordered Migliorini to open the hood of the vehicle. When checking under the hood, a different identification number was observed, and the appellant was placed under arrest (R.30,49,53).

The appellant, PETER J. MIGLIORINI, testified that at approximately 12:15 A.M. on May 6, 1972, he was driving along Hylan Blvd. in Staten Island. He was on his way to deliver a small refrigerator to a friend of his (R.58). He was stopped by two patrolmen for a safety check and when requested he turned over his license and registration. He was not given a summons for any traffic violation nor was he violating any traffic regulation (R.58, 59). After stopping him, the police officers ordered him to open up the hood of his car. He at first refused, asking them

whether they had a search warrant. When they started to arrest him, however, he reluctantly complied (R.63). Migliorini stated that he had purchased the vehicle for $6500 in October, 1971 from a Helene Silverstein, a girl he had met in a cocktail lounge (R.62,67). He had paid sales tax on the car of $455 and both his cancelled checks for the sales tax and the registration fee were admitted into evidence (R.62). The appellant further stated that he had met Miss Silverstein on three or four occasions, but had not seen her since purchasing the vehicle. After checking an address that she had given him, he had discovered that there was no such address in Rockaway, Queens (R.100,101).

Migliorini testified that he worked for his mother in a grocery business, and that he had borrowed the money from her to purchase the car. He did not know anything about the car being stolen, nor did he know a Mary Tucci, the alleged owner of the vehicle (R.69, 78). Migliorini also stated that he had never been convicted of a crime (R.79).

At the close of the Hearing, the court below denied the motion to suppress, finding that probable cause existed based upon the patrolman's expertise

regarding vehicle identification numbers and based upon the fact that the warranty sticker was missing from the car door (R.80).

THE HUNTLEY HEARING

Statements were alleged to have been made by the appellant with regard to an offer to pay $2000 to the officer to "forget" about the incident. A hearing was granted by Judge Barlow on October 27, 1972 with regard to the appellant's contention that he was not properly advised of his Constitutional right to remain silent and his request to suppress any and all admissions or statements.

Patrolman Wilmot stated that immediately after placing the defendant under arrest he was advised of his rights, and that thereafter the appellant stated "let's talk about it" (R.85,87). Wilmot left the appellant in the patrol car with his partner, Robert Fahey, and returned to drive the appellant's vehicle to the station. No further conversation was had with the appellant (R.87,88).

Patrolman ROBERT FAHEY, Wilmot's partner, stated that he heard Wilmot read

the appellant his rights (R.95). After Wilmot left, the appellant told him, "I want to make a deal. It's worth $2000 to you to let me go" (R.97). Fahey replied that he had to go to the station house to discuss it, and the appellant was driven to the 122 precinct (R.99, 100). At the precinct, Patrolman Fahey notified his superiors of the incident. (R.101). He then returned and had a further conversation with the appellant in the police sitting room. There Migliorini stated that he had $5000 in the glove compartment of the car and if they let him go the police could have $2,000 of it. Migliorini also admitted that the car was bad (R.105,106). Fahey checked the vehicle and returned with $4900 in old bills. Thereafter, he had a further conference with his superiors, and he was wired by them with a recording device (R.106,108). At about 1:30, he engaged the appellant in conversation again and recorded the appellant's remarks (R.115-122). Patrolman Fahey admitted that prior to both conversations in the police station, the appellant was not advised of his rights and that the only time the Miranda warning was given was at the scene of the arrest (R.130, 133). It was also determined during the hearing that there were defects in the tapes and that parts of them could

not be understood. Despite these facts, the court below denied appellant's motion for suppression of any admission or statement alleged to have been made by the appellant (R.138).

The Plea

On October 30, 1972, the appellant withdrew his former plea of not guilty and pleaded guilty to the crime of Bribery in full satisfaction of all counts of the indictment. The appellant during the plea colloquy stated he offered to give $2,000 to the policemen on May 6, 1972 in expectation of being let go (R.149). He further stated that no promises or threats were made to him to induce him to plead guilty with the exception that that the court had stated that it would sentence him to no more than four years (R.148).

The Sentence

During the sentence proceeding on March 22, 1973, it was established that the appellant was 26 years old, had served honorably in the U.S. Armed Forces, having spent one year in combat action in Vietnam. While in Vietnam the

appellant had served in some of the most bitter campaigns, including the TET offensive (R.152,169). Mr. Migliorini was gainfully employed assisting his mother in the operation of a grocery business in lower Manhattan. In fact, the appellant's father had been murdered in a robbery a year earlier, and his mother relied upon him to manage the family business (R.153,169). The appellant had never previously been convicted of any crime, and had a good reputation in the community (R.152). Based upon these considerations, defense counsel requested a probation sentence (R.152). The court, however, refused to consider probation and imposed an indeterminate term of up to three years (R.153). The court stated that he disliked an attempt to bribe a police officer and further that the probation report indicated a lack of full disclosure by the appellant regarding the $4900 in the glove compartment (R.154).

POINT I

THE PATROLMAN HAD NO PROBABLE CAUSE TO STOP AND SEARCH THE APPELLANT'S VEHICLE. THE MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE SHOULD HAVE BEEN GRANTED.

According to Patrolman Wilmot's own testimony, the appellant's car was stopped without a warrant on the basis of a routine check. The appellant at the time was violating no law or traffic regulation, and there was no problem with the physical condition of his car (R.19,41,47,48,56). The police officer had in fact stopped over 500 cars in the previous three months for such "Routine" checks. It is the appellant's contention that the stopping of his vehicle under these circumstances violated his Fourth Amendment rights against unreasonable search and seizure. Although the stopping and searching of a motor vehicle without a warrant has been upheld on certain occasions, the courts have continually adhered to the fundamental right of every American to travel freely without interruption or harassment. In Carroll v. U.S., 267 U.S. 132,154, the Supreme Court, although upholding a search of a vehicle for illegal whiskey recognized that:-

> "those lawfully within the country and entitled to use the public highways have a right to free passage without interruption or search unless there is known to a competent official authorized to search probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

In Terry v. Ohio, 392 U.S. 1, the Supreme Court again recognized the limitation of police searches:-

> "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which taken together with rational inferences from these facts reasonably warrant the intrusion."

In the recent case of Almeida Sanchez v. U.S. -U.S.-36 LE 2d, 13 CrL 3206 (June 21, 1973,) our nation's highest court specifically stated that police officers do not have a "field day" when searching automobiles. The Court declared:-

> "Automobile or no automobile there must be probable cause for the search...In the absence of probable cause or consent that search violated the petitioner's 4th Amendment right to be free of unreasonable search and seizure."

Relying upon the decision in Terry v. Ohio supra and Almeida Sanchez v. U.S. supra, the Supreme Court of Pennsylvania

recently condemned a routine stop of a motorist, similar to that which occurred in the case at bar. See Commonwealth v. Swanger 307 A. 2d 875 (July 2, 1973) reaffirming the earlier decision in 300 A. 2d 66. The Pennsylvania court stated at pages 877 and 878:-

> "In our opinion an automobile is certainly one place where an individual may harbor a reasonable expectation of privacy. When a police officer forces an automobile to stop and restrains the freedom of its operator and passengers to drive away he has in fact "seized" that automobile and its passengers.
>
> A stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Motor Vehicle Code. We rule before the Government may single out an automobile to stop there must be specific facts to justify this intrusion. To hold otherwise would be to give the police absolute unreasonable discretion and authority to intrude into an individual's life for no cause whatsoever."

Our own Court of Appeals has similarly recognized limitations upon police power to arbitrarily search motor vehicles. In People v. Marsh 20 N.Y. 2d 98 the court restricted the right to search vehicles when a car had been stopped for a mere traffic infraction. In the recent case of People v. Adams, 32 N.Y. 2d 451 (1973) the court found a search to be illegal in a case similar to the one at bar. In the Adams case, supra, a car had been stopped for driving with high beam headlights. In making his inquiry, the police officer requested the defendant to show his license and registration. The license and registration were in order and the vehicle's identification number matched the registration. A further check with the National Auto Check Book, however, revealed that the number did not call for the vehicle in question. Whereupon, the defendant was arrested and a later search of the vehicle produced marijuana. It should be noted that the search in the case at bar was even more horrendous than the one condemned in the Adams case since, in the case at bar, the appellant was stopped even though he nor his vehicle were in violation of any law or traffic regulation.

In the case at bar, the appellant's vehicle was stopped for no reason whatever, and even when asked to produce a license and registration, he did so. The registration matched the vehicle identification number on the dashboard and there was utterly no ground to compel the appellant to open the hood of his vehicle. The attempt of Patrolman Wilmot to justify his action on the basis of his "expert training" appears on its face to be utterly incredulous. His alleged expertise consisted of a two day course where no examination was given and where he did not even remember the names of any of his instructors. The action of the police in this instant was a clear violation of Constitutional rights and should be condemned in the strongest possible terms. The words of Justice Jackson in Brinegar v. U.S. 338 U.S. 160 are most appropos to the case at bar:-

> "These Fourth Amendment rights I protest are not mere second class rights but belong in the category of indispensable freedoms. Among the deprivation of rights, none is as effective in cowing a population, crushing the spirit of the individual and putting tension in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

POINT II

ANY ADMISSIONS OR STATEMENTS MADE BY THE APPELLANT SHOULD HAVE BEEN SUPPRESSED AS BEING MADE IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS AND AS BEING THE FRUITS OF THE POISONOUS TREE I.E. THE ILLEGAL SEARCH AND SEIZURE.

The two police officers stated that the appellant was given the Miranda warning after being placed under arrest, but that the warning was not repeated during the two interrogations at the police station. Prior to the second interrogation at the police station, the police had also arranged to have the conversation taped. Under these circumstances, it was incumbent upon the prosecution to establish a voluntary and intelligent waiver by the appellant of his Constitutional rights. It has been clearly established both by the U.S. Supreme Court and the Courts of this State that where admissions or statements are obtained from a defendant in the absence of counsel, the prosecution bears a heavy burden to establish its voluntariness and admissibility. Miranda v. Arizona, 384 U.S. 436; People v. Leonti, 18 N.Y. 2d 384; People v. Valletutti 297 N.Y. 226.

Not only were the statements made by the appellant inadmissible because of the failure to restate the Miranda warning at the second and third questioning, but all admissions are tainted as having resulted from an illegal detention and search as stated in appellant's Point I.

In People v. Rodriquez, 11 N.Y. 2d 278, 288, the Court of Appeals stated:-

> "The exclusionary rule covers not only the evidence illegally obtained but the product of the unlawful search as well. The underlying rationale is that government may not violate the constitutional guarantee and use the fruits of such unlawful conduct to secure a conviction. Walder v. U.S. 347 U.S. 62. And obviously it matters not that these fruits happen to be confessions rather than any other type of evidence. Costello v. U.S. 365 U.S. 260."

Similarly in People v. Young, 35 A.D. 2d 1061 (4th Dept. 1970) the "fruits of the poisonous tree" doctrine of Wong Sun v. U.S. 371 U.S. 471 was applied to suppress two alleged admissions. The Court in People v. Young, supra, stated:-

> "There was no probable cause for the arrest and it cannot be questioned that the defendant was illegally detained at the time the statement was obtained rendering it inadmissible...It is impermissible to use the fruits of such unlawful conduct to secure a conviction."

See also People v. Herbison, 22 N.Y. 2d 946; People vs. Paulson, 25 N.Y. 2d 445; People v. Anonymous, A 56 Misc. 2d 1022 (County Ct. Nassau 1968).

In the case at bar, any statements made by the appellant were the product of illegal police action and should have been suppressed.

POINT III

THE SENTENCE IMPOSED UPON THE APPELLANT WAS HARSH AND EXCESSIVE.

In the case at bar, the appellant was sentenced to an indeterminate term of up to three years in jail, despite the fact that he had never been involved in any prior criminal activity and had an extremely fine background up to the point of his arrest. The appellant is

27 years old and served honorably in the United States Army from 1966 to 1968. He served with distinction in the Vietnam War, having received numerous citations and medals and having seen action in the TET offensive. Since his discharge from the service, Peter Migliorini has been residing with his mother at 27-29 St. James Place, Manhattan, and has been assisting her in the operation of the family grocery store. Peter's father was killed some two years ago in a robbery of the store, and since that time his assistance to his mother has been essential to maintain the operation of the business (R.151-153,169,170). Despite the indication of the court below that the appellant failed to explain the presence of $4900 in old bills in the glove compartment of his vehicle, the appellant did inform the probation department of the circumstances surrounding that matter. According to the appellant, the money was found in the basement of the grocery store after his father's death. His father had been in the habit of placing funds there because of fear of robbery. The roll of bills was discovered several months after his father's death, and the appellant intended to bring the bills to the bank the following morning.

A sentence of imprisonment for the appellant under these circumstances was totally uncalled for and extremely harsh. The trend of modern penalogy has been that the "punishment should fit the offender and not the crime" Williams v. N.Y. 337 U.S. 241; People v. Johnson, 252 N.Y. 387. In Williams v. New York 337 U.S. 241, 248, the Supreme Court declared: -

> "retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

In the case at bar, imprisonment for the appellant serves no useful purpose, but instead may create a situation where one who made a simple mistake may be lost to society forever. The appellant, up to the time of his arrest, was a productive member of society, assisting his mother, and having given much of himself to his country during two years of service in a difficult and trying war. He, above all, is certainly worthy of all possible consideration and a fleeting moment of bad judgment should not doom him to the harsh penalty of prison life. The appellant has recognized his mistake

and is totally deserving of a second chance. Justice will well be served in the case at bar if tempered by the quality of mercy for, as the Roman philosopher Cicero long ago recognized, "Extreme justice is extreme injustice."

Wherefore, this appellate court should exercise its discretion to modify the sentence of the court below to one of probation rather than incarceration.

CONCLUSION

THE APPELLANT AND HIS VEHICLE WERE ILLEGALLY STOPPED AND SEARCHED. THE APPELLANT'S MOTION TO SUPPRESS BOTH PHYSICAL EVIDENCE AND ALLEGED ADMISSIONS SHOULD HAVE BEEN GRANTED. A REVERSAL OF THE JUDGMENT OF CONVICTION IS THEREFORE IN ORDER. IN THE ALTERNATIVE, THE SENTENCE IMPOSED UPON THE APPELLANT SHOULD BE MODIFIED IN THE INTEREST OF JUSTICE.

Respectfully Submitted,

SPYROS A. TSIMBINOS and
WILLIAM KOHN
Attorneys for Appellant
Office & P.O. Address
37-06 82nd Street
Jackson Heights, N.Y. 11372
212-446-0666

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